since the purpose for which they are to be made would still be for the purpose of purchasing properties to form an "ancestral property". I would, therefore, say that the objection on this ground would succeed.

In consequence I would, therefore, declare that the residuary estate should devolve as upon an intestacy and that, as suggested by Mr. Toh, there should be an inquiry as to who should benefit under that intestacy.

Order accordingly.

Solicitors: *Braddell Bros.; Mallal & Namazie.*

TAN GEOK LOO v. KOH BENG QUEE & ORS.

[F.C. (Tan Ah Tah Ag.C.J., Buttrose and Winslow JJ.) November 3, 1965]

[Singapore — Federal Court Civil Appeal No. 14 of 1965]

Charity — Lease for religious purposes — Whether lease created a trust or beneficial interest — Joint tenancy — Claim by adverse possession — Crown Lands Ordinance (Cap. 244), s. 8.

The appellant claimed that she had an uninterrupted possession of certain lands and premises since 1928 in circumstances whereby she acquired a title thereto by adverse possession. The lands and premises were leased to certain lessees who undertook that they would not use the premises or any part thereof other than as a place of worship. The original lessees had died and the respondents were members of the Koh Clan Association, who claimed to have had the management and control of the land and premises for the running of the temple thereon. The learned trial judge dismissed the claim of the appellant who thereupon appealed to the Federal Court.

Held: (1) the lease in this case created a trust and not a beneficial interest and the lessees held the lands and premises as joint tenants on trust for religious purposes;

(2) the appellant had not shown that she had adverse possession of the land and premises and on the facts she could never become the owner of the land and premises as she was merely the agent of the temple;

(3) the trust in this case was clearly a public trust of a charitable nature and could not fail for want of a trustee so long as the trust was capable of performance.

Cases referred to:—

(1) *Perry* v. *Clissold* [1907] A.C. 73.

(2) *Re Sassoon* [1935] A.C. 146.

FEDERAL COURT.

S. C. Chua for the appellants.

S. K. Lee for the 1st, 2nd and 3rd respondents.

Wilfred Wee Han Kim (State Counsel) for the State Advocate General.

Cur. Adv. Vult.

Winslow J.: This is an appeal from the judgment of Chua J. dated 6th January, 1965, dismissing the appellant's claim with costs and ordering vacant possession of Lots 130-1 and 130-2 in Town Sub-division III in the Island of Singapore together with the Chinese temple and buildings erected thereon and known as No. 27-A Tras Street (hereinafter referred to as "the land and premises"), in favour of the first three defendants/respondents (hereinafter referred to as "the respondents").

The plaintiff, as the appellant then was, claimed that she had been in uninterrupted possession of the said land and premises since 1928 in circumstances whereby she acquired a title thereto by adverse possession for more than twelve years. She complained of trespass on the said land and premises by the respondents "or either of them, or either of their servants or agents" on divers dates between 13th September, 1960 and 23rd April, 1961. She, therefore, claimed a declaration that they were not entitled to enter, cross, occupy or remain thereon and an injunction to restrain them, their servants or agents from doing so. She also asked for an order that the entry of the registration of an order of court dated 17th January, 1961, vesting the said land and premises in the respondents and appointing them trustees of the temple thereon be expunged from the records of the Registrar of Deeds.

The fourth defendant/respondent, the State Advocate-General, was added as a defendant by an order of court dated 24th January, 1962 in the early stages of the trial to represent any possible interests of a charitable or public nature.

The respondents resisted the appellant's claim and contended that she came to live in a hut on the said land and premises only in 1950 and never at any earlier date and that any occupation by her of any part of the said land and premises was originally a trespass. She was, however, subsequently permitted to stay in the said hut for short periods by the Koh Benevolent Association of which the respondents were members. They further contended that she had never been in occupation as owner and that she had never acquired any title by adverse possession. They also claimed that the original trustees of the temple, who were the lessees of of the said land and premises, entrusted the management of the temple originally in 1925 to two committee members of the Koh Benevolent Association, Koh Chwee Ngau and another who, subsequently, on the registration of the Singapore Koh Benevolent Association in 1936, continued to manage and control the said land and premises on behalf of the association. This association subsequently merged in 1953 with the Singapore Koh Clan Association. They, therefore, claimed on behalf of the Koh Clan Association, to have had management and control of the said land and premises without any break or opposition at least since 1936 until they were

ousted from the said land and premises in December, 1960 when the appellant forcibly took possession thereof by erecting and locking an iron gate leading thereto and that, in all the circumstances, they had committed no trespass as alleged.

They accordingly counterclaimed that the registration of the statutory declaration made by the appellant on 2nd April, 1959 claiming uninterrupted possession of the said land and premises should be cancelled and expunged from the records of the Registrar of Deeds and also counterclaimed for vacant possession of the said land and premises.

An examination of the previous history of the said land and premises reveals that, by an Indenture of Lease No. 2457 dated 24th October, 1903 the Crown demised the said land and premises unto the lessees (who are described in the parties clause at the commencement of the lease) as "Lee Cheng Yan of Teluk Ayer Street, merchant, Singapore, Wee Boey of 25 Teluk Ayer Street, trader, Singapore, and Lee Chek Kian of 39 Cecil Street, trader, Singapore, the present trustees of the Chinese temple now standing on the piece of land hereby demised (hereinafter called 'the lessees')".

The habendum clause reads — "to hold the said premises hereby demised unto the lessees for the term of nine hundred and eighty one years from the 2nd day of May 1903". The lessees "for themselves their heirs, executors, administrators and assigns" covenanted with the King's Majesty His Heirs and Successors that they would "pay the said rent in manner hereinbefore mentioned" . . . and also that they would "not use the said premises or any building now or hereafter to be erected thereon or permit the same to be used for any purposes other than those of a place of worship and purposes connected therewith". The yearly rent specified in the lease is "one pepper corn if and when the same shall be demanded".

Finally, in the concluding part of the lease, it is declared that the term "lessees" shall include the executors, administrators and assigns of the said Lee Cheng Yan, Wee Boey and Lee Chek Kian.

It should be noted that Lease No. 2007 issued in 1885, presumably for 999 years, in respect of the same land was surrendered in 1903 when the present Lease No. 2457 was issued for 981 years. Lease No. 2007 was not in evidence, except by reference to it at the top of the present lease.

It was contended by Mr. Chua, counsel for the appellant that the learned trial judge was wrong in holding that this lease created a trust and that the persons named therein as lessees took the lease as trustees and not as beneficiaries. He said that this was the most important ground of appeal and that if the lease did not create a trust then his client was entitled to succeed since the respondents would be complete strangers, whereas she was in undoubted possession at least from December, 1960. For this proposition on the strength of a possessory title he relied on *Perry* v. *Clissold* [1] where Lord Macnaghten said at page 79 as follows:—

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title".

From the evidence it appears that the original lessees were taken away by the Japanese during their military occupation of Singapore and have never been heard of since.

I have, therefore, to consider whether this lease created a trust. The following facts are relevant to a consideration of this question:—

(a) the lease describes the lessees as "traders" etc. and further continues to assert that they are "the present trustees of the Chinese temple now standing on the piece of land hereby demised";

(b) only a yearly rent of "one pepper corn if and when the same shall be demanded" is stipulated in the lease;

(c) the lessees have covenanted not to use the said land and premises or to permit the same to be used for any purposes other than those of a place of worship; and

(d) no words of severance indicating an intention to create only a tenancy in common are used in the lease.

These facts lead me to the irresistible conclusion that the lease created a trust and not a beneficial interest.

Further, Professor Cheshire in his Modern Real Property (9th Edition) at page 294 states as follows:—

> "A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares, or, to use technical language, without words of severance. If an estate is given, for instance, to
>
> *A.* and *B.* in fee simple,
>
> without the addition of any restrictive, exclusive or explanatory words, the law feels bound to give effect to the whole of the grant, and this it can do only by creating an equal estate in them both. From the point of view of their interest in the land they are united in every respect. But if the grant contains words of severance showing an intention that *A.* and *B.* are to take separate and distinct interests, as for instance where there is a grant to
>
> *A.* and *B.* equally,
>
> the result is the creation not of a joint tenancy but of a tenancy in common".

I do not think that the above proposition can be questioned. A joint tenancy is accordingly created by a demise to two or more persons without words of severance.

Moreover, the original lessees were obviously men of substance and I can think of no reason why the officer administering the Government should have wanted to confer a benefit on them when he was perfectly aware of and, in fact, recognised them as trustees of a then existing temple on the said land and premises. Nor can I think of any reason why men of substance such as the lessees would want to take a beneficial lease of land restricted to religious purposes as, obviously, they could never have expected to make any profit out of it and never did so.

Before I leave the question of the lease I think I ought to refer to section 8 of the Crown Lands Ordinance (Cap. 244) which provides as follows:—

"8. — (1) Any land granted or leased by or on behalf of the Crown or the late East India Company free of rent, or at merely nominal rent, as a building site for a religious edifice, or otherwise for religious or charitable purposes, shall be forfeited to and vest in the Crown if at any time such land or building thereon be applied without the written consent of the Yang di-Pertuan Negara to other purposes than those specified in the grant or lease, if any such are therein specified.

(2) This section applies to all grants and leases whenever made".

It is clear that this was a lease of Crown land for religious purposes. The covenant in the lease that the land and premises would not be used for any purposes other than those of a place of worship invites a consideration of section 8 aforesaid if a breach has occurred or is alleged to have occurred.

It is clear from the evidence on both sides that some part of the land on which the temple stands has been, and is being used for dwelling purposes, but there is no evidence before me as to whether the written consent of any former Governor or the present Yang di-Pertuan Negara has been obtained for such use. Counsel who represented the State Advocate-General did not refer to this provision and I do not, therefore, propose to say anything more about it. Anyway, he said little except to support Mr. S. K. Lee, for the respondents, as to the existence of a trust.

Counsel for the appellant also relied on the definition of "lessees" contained in the lease for the proposition that a tenancy in common and not a joint tenancy was thereby created.

For the reasons I have set out earlier I do not consider that this definition necessitates a construction limiting the interest conferred on the lessees as trustees of the temple. The grantor's meaning must be ascertained by reading the lease as a whole (see *re Sassoon* [2]). If a clear trust for religious or charitable purposes can be gathered from reading the lease as a whole, then the fact that a definition which sets out that "lessees" shall include "executors, administrators and assigns" cannot, in my opinion, operate to confer a tenancy in common on lessees who are impressed with such a trust.

Undoubtedly the definition incorporates inappropriate words or words which can be criticised as being inappropriate to a lease to joint tenants. Mr. Chua contended, on the authority of Form 129 contained in Volume VII of the *Encyclopaedia of Forms and Precedents*, that the definition should have included "the survivor of them and their and his executors, administrators and assigns" if a joint tenancy was intended. Form 130 in the same volume defines "lessees" in a lease to tenants in common as including "their respective executors, administrators and assigns". It should be noted that in both Forms 129 and 130, "lessees" includes "their executors, administrators and assigns" and that, whereas Form 129 does not contain words of severance, Form 130 does. I, therefore, reject the contention that the definition is so clear or free from doubt as to exclude the manifest intention contained in the lease.

This disposes of the first and most important ground of appeal. The remaining seventeen grounds of appeal, in the main, assail findings of fact by the trial judge or, at the very highest, findings on questions of mixed law and fact.

The trial judge carefully analysed the evidence given on behalf of the appellant as well as that adduced on behalf of the respondents. In the result he found that the appellant and her sister-in-law's husband, Ong Lian Kee, who gave evidence on her behalf, were not witnesses of truth. With regard to another witness who gave evidence for the appellant, one Sim Teow Geok, who is at present an advocate and solicitor and who is the grandson of Ong Lian Kee, he found that this witness was speaking of matters which occurred when he was a very young boy and he considered, therefore, that his evidence was unreliable on that ground. On the other hand he concluded that the story of the respondents was the true story and that the appellant "never was in control of the temple and land until she put up the gate in December, 1960, and locked it and put herself into exclusive possession of the temple and the land". Complaint is accordingly made in grounds 4 and 5 that the trial judge erred in fact in coming to these conclusions.

In my opinion there was ample evidence to justify the trial judge's conclusions.

The remaining grounds give illustrations, from the evidence, of facts with regard to which, it is alleged, the trial judge made findings which

were either wrong or insufficiently supported or not supported by the evidence and the court was asked to hold that, by reason of these wrong findings, the trial judge made a wrong assessment of the credibility of the appellant and her witnesses as aforesaid, and that he was, therefore, wrong in preferring the story told by the respondents which he held to be the true story.

I do not propose in this judgment to refer to every single ground of appeal but only to such of them as will help to dispel fears that these conclusions were wrong.

For example, ground 2 sought to attack the finding that a Chinese temple known as "Ho Lim Keng" temple existed on the land demised from as long ago as 1873 and that it was subsequently renovated in 1876 and 1887 at public expense. I am amazed that complaint has been made of this finding which is more than amply supported by evidence and in particular, by the evidence of certain granite and marble tablets (built into the wall of the temple) of which photographs were produced. Mr. Chua objected to these photographs on the ground that the tablets were anonymous documents. It is clear from Exhibits 31 - 34 that they are not anonymous as the names or identities of the directors who engraved these tablets are set out thereon. The inscriptions on these tablets are relevant and fully support the trial judge's finding.

Further, complaint was also made that the trial judge erred in fact in holding, that —

(i) the appellant had not been living continuously in the temple at least since 1936 and that there had been breaks in her residence between 1950 to 1959;

(ii) the appellant could not be believed when she said that the Koh Benevolent Association had been housing deities and conducting certain ceremonials and celebrations of a religious or public nature inside the temple only with her permission;

(iii) the allowances paid to Koh Chwee Ngau, who had been entrusted by the original trustees with the care of the temple in 1925, (and after his death in 1958, to Koh Thiam Hock) by the Koh Clan Association, who carried out the trust, were paid to them for their services in looking after the temple;

(iv) Koh Chwee Ngau sold joss paper and candles and paid assessment from the proceeds thereof and kept the assessment receipts in the temple;

(v) the appellant had never paid assessment and had taken over the assessment receipts produced by her from the temple, where presumably the caretakers, on behalf of the association, had kept them.

These are pure findings of fact with which there is no cogent reason why an appellate court should interfere.

The appellant claimed possession of the temple from 1928, when she went into occupation of a lean-to adjoining the temple after her marriage with one Koh Yew Hock, who lived there. All the evidence, however, points to her having lived in a house which Koh Yew Hock bought in Kampong Hiap Guan San where she gave birth to all her children. Evidence from official sources, such as the Registry of Persons and the Electoral Registers, makes it quite clear that her residence at No. 27-A Tras Street (where the temple is) was never of a continuous or permanent nature and that she gravitated between the two addresses from time to time in circumstances clearly indicating that she was never at any time after 1928 ever in uninterrupted possession of the temple for the minimum of twelve years required to support her claim.

As against this, the evidence of the respondents which was believed, is to the effect that they and the association, which they now represent and their predecessors who derived authority from the original trustees, have been continuously and without let or hindrance notoriously in charge of the temple from as far back as 1925 and that any recognition accorded to the appellant after 1950 was not in her capacity as their "overlord" or someone who permitted them to use the temple but as the widow of a fellow-clansman, Koh Yew Hock, to whom they accorded privileges as a special member on account of her poverty after her husband's death.

In any case they did not tolerate her presence on the said land and premises until 1950 when she commenced paying intermittent visits to Ong Lian Kee, the husband of her sister who died in 1949. In the course of such visits she spent some nights there. The person who was in control of the temple, however, was the resident caretaker, Koh Chwee Ngau, on behalf of the association. It was after the death of Koh Chwee Ngau in 1958 that the appellant was no doubt emboldened by the absence of a resident caretaker to embark on a dark, if not deep stratagem designed to bolster her claim to undisputed possession of the temple. Koh Thiam Hock, who succeeded Koh Chwee Ngau as caretaker did not reside at the premises although he was in charge for a few hours a day. It is small wonder, therefore, that the tolerance shown to her and an apparent relaxation in the exercise of control and management of the temple led eventually to her filing a statutory declaration of long possession in 1959 (after Koh Chwee Ngau's death) and finally to her erecting a gate whereby she locked out the association in December, 1960.

Most of the documents relating to assessment payments in respect of the temple and indeed many other papers which were kept in a drawer by Koh Chwee Ngau and others on behalf of the association were, therefore, inaccessible to the caretaker and the association after the appellant locked them out.

When, therefore, the appellant produced in evidence the assessment receipts in respect of

the said land and premises and claimed to have paid assessment from 1951, it was clearly open to the trial judge to find that she had found them in the temple.

In fact, having regard to the view which he formed of the credibility of the appellant and the respondents respectively, after seeing them in the witness-box, it seems to me that it would be otiose to examine in detail the reasons why the trial judge rejected the appellant's version of the various different factual situations adduced by her in support of her claim to long possession. There were more than ample reasons for regarding her as a highly dubious witness and for doubting her veracity as well as that of her brother-in-law, Ong Lian Kee.

Finally, one further ground, perhaps requires an expression of my views. Complaint was made that the pleadings were allowed to be amended at the instance of counsel for the respondents after the appellant's case had become known. I do not consider that there is any merit in this ground. There was a clear discretion to allow such an amendment and, in my opinion, it was properly exercised notwithstanding the untenable claim that the appellant was prejudiced thereby. I cannot see how she could have been prejudiced at all because her claim was to possession from 1928. Any amendment affecting any period subsequent to 1950 could not have embarrassed her at all because if her story were true she would have already proved adverse possession for 22 years prior to 1950. Moreover, any admission in paragraph 2 of the defence before amendment did not necessarily involve an admission that she had continuously been in possession after 1950 so as to take her by surprise with evidence that, even after 1950, her possession had been intermittent.

It is regrettable that this case has taken such a long time to reach its conclusion. Proceedings commenced in 1961 and concluded in early 1965. The appellant could never have become the owner of the land and premises because on her own showing (as she claimed in her Income Tax returns) she was merely an agent of the temple. In my opinion she was in no better a position than an intermeddler in a public trust of a clearly charitable nature, of which there was overwhelming evidence, documentary and otherwise. It is well-known that a public trust can never fail for want of a trustee as long as the trust is capable of performance. How any claimant such as the appellant could have possibly hoped to succeed in permanently excluding from the said land and premises the trustees of a trust for religious advancement, being one obviously designed to benefit the public or at least a substantial section of the public, is beyond understanding.

The appeal is accordingly dismissed.

Tan Ah Tah Ag.C.J. and **Buttrose J.** concurred.

Appeal dismissed.

Solicitors: *Lee & Lee; S. K. Lee.*

PERIASAMY v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye F.J. and Ismail Khan J.) November 6, 1965]

[K.L. — Federal Court Criminal Appeal No. X 2 of 1965]

Criminal Law and Procedure — Trial — Witness lying on one or two points — Not reliable witness — Evidence of independent witness — Whether finding of fact of trial judge can be disturbed.

The appellant with four others were accused of being members of an unlawful assembly, the common object of which was to cause harm to one *R*. On the categoric evidence of the appellant that the co-accused had nothing to do with the events alleged to have taken place the learned trial judge acquitted the other accused and amended the charge against the appellant to one of causing voluntarily grievous hurt to *R* with a parang. The learned judge then referred to the contradictions and discrepancies in the evidence for the prosecution and stated that he was satisfied that the appellant had voluntarily caused grievous hurt to *R*. On appeal,

Held: the evidence of the complainant required close scrutiny in the context of the rest of the evidence for the prosecution and the defence and in the circumstances of this case as the evidence of the independent witness (a police constable) did not support the evidence of the complainant, the conviction should be quashed although in doing so the appellate court would be drawing its own inference from the facts and would be coming to a finding different from that of the trial judge.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, 107.

(2) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

(3) *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 258.

FEDERAL COURT.

R. Tallalla for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant was in the first place tried on a charge that he with four other accused being members of an unlawful assembly, the common object of which was to cause hurt to one Ramasamy, one of their members caused grievous hurt to the said Ramasamy with a parang and thereby committed an offence under sections 149 and 326 of the Penal Code.

Substantive evidence of the primary facts was given by Ramasamy himself supported by close members of his family, viz. his younger brother Maniam (P.W.2), his son Muniandy (P.W.4) and mother Thanapackiam (P.W.5). Since, however, Ramasamy himself categorically stated that none of the other four co-accused had